Randell Warehouse of Arizona, Inc. *and* Sheet Metal Workers' International Association, Local 359, AFL–CIO. Case 28–CA–16040

July 26, 2006

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

This case presents the issue of whether the Union's unexplained photographing of employees while union representatives distributed campaign literature to them prior to the election constituted objectionable conduct. Overruling established precedent holding that such photographing has a reasonable tendency to interfere with employee free choice, the Board's initial decision in this proceeding found that the conduct was not objectionable.[1] The Respondent sought review of the Board's decision in the United States Court of Appeals for the District of Columbia Circuit, which subsequently remanded to the Board "for further consideration and a reasoned opinion."[2]

Upon reconsideration, we find that the *Randell I* Board erred in its initial disposition of this case. Prior to *Randell I*, Board precedent established that "absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate."[3] The Board, concerned with the potentially intimidating nature of the conduct, rather than the identity of the party photographer, did not distinguish between employer and union photographing.[4] The *Randell I* majority overruled that precedent, but only as to union photographing of employees engaged in Section 7 activity, which the Board held to be nonobjectionable conduct unless accompanied by an express or implied threat or other coercion. The *Randell I* majority retained the rule that employer photographing was presumptively coercive, even if it was not accompanied by an express or implied threat or other coercion.[5]

By adopting different standards for union and employer photographing of employees engaged in Section 7 activity, the Board's decision in *Randell I* marked a significant departure from established precedent. After due consideration, we have concluded that the *Randell I* rationale cannot withstand careful scrutiny. To the contrary, the rationale for finding that unexplained photographing has a reasonable tendency to interfere with employee free choice applies regardless of whether the party engaged in such conduct is a union or an employer. Thus, the disparate treatment embraced by the *Randell I* Board cannot be squared with the Act's fundamental principles. Accordingly, we overrule *Randell I* and restore the appropriate standard, i.e., that in the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.

I. FACTUAL BACKGROUND

The Respondent's objections allege (1) numerous acts of intimidation, including threats and implied threats by union adherents and agents directed to eligible voters; and (2) other acts of interference, restraint, and coercion by union adherents and agents that affected the results of the election. A third objection filed by the Respondent asserted that the Board agent failed to maintain proper control over the voting area. The hearing officer recommended overruling the third objection, and the Respondent did not except.

With respect to the Union's photographing of employees, the parties stipulated that prior to the election, union representatives took photographs of the distribution of union literature outside the Respondent's facility. Several employees also testified that photographs were taken outside the Respondent's facility on other occasions, but they could not identify the person taking the pictures. The photographs included both employees who accepted and those who rejected proffered literature. Employee Carlos Velazquez testified that when he asked one of the individuals distributing the flyers why the other person was taking pictures, he was told, "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run." Velazquez also testified that he knew that this individual was "a representative from the Union" because he was with the individuals who were handing out leaflets.

[1] *Randell Warehouse of Arizona, Inc.*, 328 NLRB 1034 (1999) (*Randell I*). Thereafter, the Respondent refused to bargain with the Union and the Board issued its decision finding that the refusal to bargain violated Sec. 8(a)(5) and (1). *Randell Warehouse of Arizona, Inc.*, 330 NLRB 914 (2000).

[2] 252 F.3d 445, 449 (D.C. Cir. 2001). Following the court's remand, the Respondent and the Union filed statements of position.

[3] *F. W. Woolworth*, 310 NLRB 1197 (1993).

[4] However, as discussed below, the Board, in *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), said that photographing by a union is coercive unless there is *an explanation*, presumably given to the photographed employees.

[5] *Randell I*, supra, 328 NLRB at 1037.

The other election objection filed by the Respondent relates to other acts and conduct of union supporters prior to the election. At a preelection campaign meeting called by the Respondent, an employee asked what would happen if there was a strike and some employees crossed the picket line. Employee Ray Encinas, an open union supporter, responded that "they would bring somebody from down below [Mexico] to take care of those people." At a second meeting, an employee asked what would happen to individuals who did not want to become union members if the Union was voted in and Encinas replied that "they would have the Chico Mafia take care of those people." In addition, employee Pepe Valenzuela pointed to a "Vote No" tag that employee Johnny Vielma was wearing and told him that "there is people here that beat up people that wear that."

The hearing officer discredited testimony by employee Carlos Velazquez that, about a week before the election, prounion employees Jesus Gallegos and Guillermo Celaya told him to take off a blue tag reading "Randell, Vote No," that Gallegos told Velazquez that he was looking for problems, and that later that same day Gallegos and Celaya chased him in their cars as he was driving home after work and attempted to box him in and force him off the road. Instead, the hearing officer found that, in fact, Velazquez had cut into a lane of traffic in which Celaya was approaching, which caused Celaya to slam on his brakes to avoid hitting Velazquez' car. The hearing officer acknowledged, however, that a rumor circulated throughout the plant that Velazquez had been almost forced off the road while driving home from work. After hearing the rumor, Leadman Valenzuela told Velazquez, "You have to be careful, you don't know what they are doing, they are crazy."

A. The Hearing Officer's Report

The hearing officer found that the photographing described above was attributable to the Union and interfered with employee free choice in the election. Applying the standard set forth in *Pepsi-Cola Bottling*, supra, the hearing officer found no evidence that the Union ever communicated to employees the reason for the photographing. The hearing officer also found that, in any event, the explanation given, i.e., "it's for the Union purpose," was "hardly enough to comfort someone that the photographs might not be used for some other, possibly devious, purpose." Accordingly, the hearing officer recommended that the election be set aside.

The hearing officer found no merit to the remaining objections filed by the Respondent. Specifically, he found that none of the individuals who were alleged to have engaged in unlawful threats or other coercive statements were officers, representatives, or agents of the Union. Applying the third-party misconduct standard, which requires proof that the misconduct is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible,"[6] the hearing officer concluded that the alleged threats and other coercive statements set forth above were not objectionable.

B. The Board's Decision in Randell I

The *Randell I* Board adopted the hearing officer's finding that the alleged third-party threats "were not made by agents, representatives, or officers of the Union, and that they were not objectionable when measured by the Board's third-party standard."[7] A majority of the Board, however, reversed the hearing officer's recommendation that the Respondent's objection to the Union's photographing of employees be sustained. The *Randell I* majority stated that prior Board and court decisions permit unions to ask employees directly whether they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' responses.[8] Finding that the standard for union photographing of employees in a preelection setting established by *Pepsi-Cola Bottling* was inconsistent with these decisions, the *Randell I* majority held that the Union's photographing employees during the distribution of union literature outside the Respondent's premises was not accompanied by any express or implied threats or other coercion and therefore was not objectionable.

The *Randell I* Board acknowledged that it was applying a different standard to union photographing than it applied to employer photographing of employees engaged in Section 7 activities, which the Board has held to be coercive absent proper justification, because the latter

[6] *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

[7] *Randell I*, supra, 328 NLRB 1034 fn. 4.

The Respondent's exceptions to the hearing officer's report do not dispute the hearing officer's determination that the individuals who made the threats and other coercive statements were not agents, representatives, or officers of the Union. The Respondent also did not contend that these individuals were agents of the Union in its petition for review filed with the court of appeals.

[8] The Board cited *Springfield Hospital*, 281 NLRB 643, 692–693 (1986) (union asked employees whether they were for or against union and recorded responses), enfd. 899 F.2d 1305 (2d Cir. 1990); *Kusan Mfg. Co.*, 267 NLRB 740 (1983) (union solicited employees to sign petition), enfd. 749 F.2d 362 (6th Cir. 1984); *J.C. Penney Food Department*, 195 NLRB 921 fn. 4 (1972) (union polled employees as to how they would vote), enfd. 82 LRRM 2173 (7th Cir. 1972); and *Mercy-Memorial Hospital*, 279 NLRB 360 (1986) (union asked prounion employees to report activities of coworkers who were assisting management), enfd. sub nom. *NLRB v. Mercy-Memorial Hospital Corp.*, 836 F.2d 1022 (6th Cir. 1988).

has a tendency to intimidate.[9] The Board stated that this disparate treatment was justified because "photographing employees during an organizing campaign is one means by which unions can determine the identity and leanings of employees and carry out their legitimate objective of obtaining majority support,"[10] and because of the greater coercive potential attached to photographing by "an employer [who], unlike a union, has virtually absolute control over employees' terms and conditions of employment."[11]

The *Randell I* Board further stated that it was not overruling *Mike Yurosek & Son, Inc.*,[12] because it "would reach the same result today on the facts presented there," 328 NLRB at 1036. In reality, the *Randell I* analysis departed significantly from that of the majority opinion in *Mike Yurosek*, which relied specifically upon *Pepsi-Cola* in finding that a union representative engaged in objectionable conduct when he photographed campaign activity at the entrance gate of an employer's plant.[13] The *Mike Yurosek* majority therefore held that the photographing would be objectionable even if it were not accompanied by threats or other coercion. Only the concurring Member (Higgins) in *Mike Yurosek* relied on the threats.

Attempting to distinguish *Mike Yurosek* from the facts of the present case, the *Randell I* Board reasoned as follows:

> In contrast to *Pepsi-Cola*, where the union's videotaping was not accompanied by any threats or other coercive conduct, in the *Mike Yurosek* case, a union representative told an antiunion activist that "we've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here." As former Member Higgins pointed out in *Mike Yurosek*, "the photographing of antiunion employees accompanied by this statement could reasonably put employees in fear that the pictures would be used for future reprisals and was therefore objectionable." 292 NLRB at 1074 fn. 5. Significantly, no threats of this character, attributable to the Union, are present in the instant case. [328 NLRB at 1036.]

In sum, the *Randell I* Board effectively adopted the concurring opinion in *Mike Yurosek* and found no objectionable conduct because no comparable threats accompanied the Union's photographing in *Randell I*.

C. Court of Appeals Decision

The D.C. Circuit declined to enforce the Board's decision, and instead remanded the case to the Board for "further consideration and a reasoned opinion. . . ."[14] The court declined to rule on the change in Board law undertaken by the *Randell I* Board. Instead, the court remanded the case for the Board to consider further the applicability of *Mike Yurosek*. The court stated that "the applicability of *Mike Yurosek* is a critical issue the Board should have examined carefully. Yet, having announced that *Mike Yurosek* would continue to apply, the Board failed to explain why the threatening conduct catalogued by the Hearing Officer did not amount to objectionable conduct under that case."[15]

II. ANALYSIS

As noted above, the *Randell I* Board essentially adopted the concurring opinion in *Mike Yurosek* and indicated it would reach the same result on the facts of that case even after overruling the *Pepsi-Cola* presumption that unexplained videotaping by a union agent was objectionable. In the court's opinion, however, the Board failed adequately to explain how the union agent's threats in *Mike Yurosek* made union videotaping objectionable there while threatening statements in this case did not. As the court noted, "Union supporters had engaged in at least three separate instances of potentially

---

[9] The Board cited with approval *F.W. Woolworth Co.*, supra (1993) (employer unlawfully photographed and videotaped employees handing out leaflets in front of store).

[10] *Randell I*, supra, 328 NLRB at 1036.

[11] Id. at 1037. In support of this latter proposition, the Board cited *Plant City Welding & Tank Co.*, 119 NLRB 131, 133–134 (1957), revd. on other grounds sub nom. *Boilermakers Local 609 v. NLRB*, 133 NLRB 1092 (1961).

Former Member Brame concurred in the majority's finding that the photographing in this case was not objectionable conduct, but disagreed with the majority's adoption of different standards for employers and unions. Former Member Hurtgen, dissenting, would have set aside the election.

[12] 292 NLRB 1074 (1989).

[13] The *Mike Yurosek* majority explained:

> In *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988), the Board found that the appearance of videotaping by a union representative of at least two employees at a rally the day before the election gave the employees the impression that the pictures would be used for future reprisals against them. The Board noted that no legitimate explanation for the videotaping was offered to the employees at the rally, and that none was proffered at the hearing. Under these circumstances the Board concluded that the conduct would reasonably tend to interfere with employee free choice in the election. Similarly, in the instant proceeding the pictures of employees were taken by a union agent and, like *Pepsi-Cola Bottling Co.*, no explanation was provided to employees while pictures were being taken to assuage their fear that the pictures would be the basis for future reprisals. Further, [the contemporaneous remarks of Union Agent Hansen with respect to the videotaping] are arguably threatening, and certainly do nothing to assure employees that the pictures Hansen was taking would not be improperly used. [292 NLRB at 1074.]

[14] *Randell Warehouse of Arizona v. NLRB*, supra, 252 F.3d at 449.

[15] Id.

threatening conduct," and "rumors about a fourth and graver incident circulated throughout the plant." 252 F.3d at 449.

The dissent contends that the threatening statements and rumor in this case did not make the Union's photographing objectionable because they involved third-party conduct, rather than the conduct of a union agent, and had no direct connection with the photographing. We need not decide whether the distinction drawn by the dissent is sufficient to justify a different result in this case than in *Mike Yurosek* because we disagree with the proffered justifications for the Board's reversal of precedent in *Randell I*. Consequently, in agreement with the primary rationale of the *Mike Yurosek* majority, we find that the unexplained union videotaping or photographing in each case was objectionable even if not accompanied by any threats or other coercive conduct.

Our precedent establishes that an employer's unexplained photographing of employees engaged in Section 7 activities has a tendency to intimidate employees. *Waco, Inc.*, 273 NLRB 746, 747 (1984); *F. W. Woolworth*, 310 NLRB 1197 (1993). This precedent rests on three premises: (1) during an election campaign, an employer may be displeased with employees who exhibit support for the union or fail to support an employer's campaign against the union, e.g., by accepting union campaign literature or by declining to accept employer literature; (2) the photographing and videotaping of employees engaged in such activity constitutes permanent recordkeeping, which is more than "mere observation"; and therefore (3) employees could reasonably fear "that the record of their concerted activities might be used for some future reprisals."[16]

We hold that these premises also apply when a union photographs employees engaged in Section 7 activity. In the context of an election campaign, the union seeks to become (or remain) the representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer's solicitation to reject union representation.

Likewise, there is no substantial basis for finding that the photographing of employees responding to efforts to enlist their support reasonably tends to create a fear of reprisal when done by an employer but not when it is done by a union. In either case, employees know that they are being recorded by a party to the election. The permanent recording suggests an intent to take the employees' response into account. While that may not trouble an employee who supports the photographer's position in the organizing campaign, it is likely to raise reasonable concern among nonsupporters or open opponents that their pictures could be used against them in the future. See *Overnite Transportation Co. v. NLRB*, 294 F.3d 615, 624 (4th Cir. 2002) ("We have little doubt that there will be some instances of union photography that will be inherently restraining or coercive of the right of employees to exercise their Section 7 rights.").

In attempting to distinguish the effects of union photographing on employees engaged in Section 7 activity from employer photographing that has a presumptive tendency to intimidate, the *Randell I* majority, like the dissent here, relied heavily on the argument that employees would not fear reprisals in the case of union photographing because unions are said to be less able to retaliate against employees than employers. We recognize that employers possess some means of retaliation that are generally not available to a union. However, the Board's experience in the administration of the Act, as well as the legislative history of the Act, show that unions also have ample means available to them to punish employees, and that some unions have used that power in reprisal against employees who oppose them in organizing campaigns.

Once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them. See, e.g., *Letter Carriers Branch 3126 (Postal Service)*, 330 NLRB 587 (2000) (union unlawfully caused employer to deny overtime to nonmember), enfd. 281 F.3d 235 (D.C. Cir. 2002); *Teamsters Local 17 (Universal Studios & Warner Bros.)*, 251 NLRB 1248 (1980) (union unlawfully caused employer to discharge nonmembers). Consistent with the foregoing, a reasonable employee could believe that a union could make good on threats to have antiunion employees fired or run off the job if the union won the election. *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 446 (4th Cir. 2002) (union agents told employees that if the union won they would run them off or get them fired); see also *Mike Yurosek*, supra (employees could reasonably fear reprisal when union agent photographed antiunion employees and told them, "We've got it on film; we know who you guys are . . . after the Union wins the election some of you may not be here"); *Alyeska Pipeline Service Co*., 261

[16] *Waco*, 273 NLRB at 747 (quoting *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976)).

NLRB 125 (1982) (union coerced employees during election campaign by promising to give union members an unlawful advantage over nonmembers in its operation of its hiring hall); *Graham Engineering*, 164 NLRB 679, 694–695 (1967) (union coerced employees who opposed the union by threatening to discharge and withhold its services from them). Indeed, the Board has justified the different standards applied to third-party and union election conduct on the very ground that "employees reasonably have a greater concern about threats emanating from the union that may become their exclusive representative." *Cal-West Periodicals, Inc.*, 330 NLRB 599, 600 (2000).

A union's powers of reprisal are not limited to its potential authority as a collective-bargaining representative. Indeed, evidence of abuses by unions of their power over employees during organizational campaigns motivated Congress to establish union unfair labor practices in the Taft-Hartley Act. The Senate report discussing what became Section 8(b)(1)(A) stated that "the committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns."[17] Similarly, in review of the legislative history of Senate floor debate on this provision, the Supreme Court found that "[t]he note repeatedly sounded is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress, or reprisal."[18] Thus, contrary to the *Randell I* majority, there is ample reason to believe that employees subjected to unexplained union photographing of Section 7 activity prior to an election could reasonably tend to fear reprisal because unions have the capacity to affect them. The opportunities for and means of reprisal available to unions may differ from those available to employers, but they are no less real or intimidating.

Furthermore, the legislative history of the Taft-Hartley Act indicates that Congress intended similar standards to apply to like kinds of employer and union intimidation.[19] Consistent with this concept, the Board uses the same general standard in evaluating the conduct of the parties in the election setting: whether the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984); *Bristol Textile Co.*, 277 NLRB 1637 (1986). The distinction drawn by the *Randell I* majority and the dissent here as to the parties' relative capacity for reprisal provides no basis for departing from a uniform standard for objections to a specific form of coercive conduct that is equally available to unions and employers, namely, the photographing of employees engaged in Section 7 activity during an election campaign.

Equally untenable is the *Randell I* majority's contention that union photographing is not objectionable, absent explicit accompanying threats, because it cannot be distinguished from legitimate union organizing activity such as soliciting employees to support the union by signing petitions or authorization cards. The Board has held that it is not objectionable conduct for a union to solicit employees noncoercively to support it and to maintain a written record of how employees respond.[20] Contrary to the *Randell I* majority, it does not follow from this proposition that unions may also photograph how employees respond to solicitations. In this respect, there is a significant difference between photographing and other means used by unions to identify supporters in an organizational campaign.

Direct personal solicitation and polling are the primary means by which unions effectuate the policies of the Act by affording employees the right to "self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."[21] These activities present the threshold opportunity for employees to choose whether to be represented during an organizational campaign. In particular, the voluntary signing of petitions or authorization cards is a necessary prelude to a union's seeking a Board election or voluntary recognition from an employer. Solicitation and polling by a union also provide natural occasions for bilateral discussion and noncoercive attempts to persuade. While a union solicitor typically will explain to the employee the purpose of the solicitation during such discussion, the need to solicit and persuade as part of an organizational campaign is obvious even without an ex-

[17] S. Rep. No. 105, 80th Cong., 1st Session. 50.

[18] *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 286 (1960).

[19] See *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738 (1961) (employer and union violated Sec. 8(a)(2) and Sec. 8(b)(1)(A) respectively by according and accepting recognition of the union's representative status in the absence of majority employee support). We recognize that the language of Sec. 8(b)(1)(A) is narrower than Sec. 8(a)(1). However, the underlying case here is an objections case, not an unfair labor practice case. Whatever the implications of this dissimilarity in statutory language may be for employer and union unfair labor practices, they do not apply to our evaluation of election objections based on the same conduct, i.e., employer and union photographing of employees engaged in Sec. 7 activity.

[20] See, e.g., *NLRB v. Media General Operations, Inc.*, 360 F.3d 434, 441 (4th Cir. 2004) (union's directly soliciting employees to sign "vote yes" petition not objectionable conduct); *Springfield Hospital*, supra (union asked employees whether they were for or against union and recorded responses), enfd. 899 F.2d 1305 (2d Cir. 1990); and *J.C. Penney Food Department*, supra (union polled employees as to how they would vote).

[21] National Labor Relations Act, 29 U.S.C. § 157 (Sec. 7).

planation. Even employees opposed to unionization would reasonably tend to regard personal solicitation and polling (devoid of accompanying coercive statements or conduct) as serving the legitimate purpose of identifying union supporters in an organizational campaign.

Photographing employees during the course of organizing activities is different. It captures a nonconsensual record of the extent of an employee's participation in or receptiveness to certain Section 7 activity. In addition, while polling and the solicitation of authorization cards, like photographing, may create a permanent record of an employee's position,[22] the purpose of photographing employees engaged in Section 7 activities is rarely self-evident. To the contrary, an employee who is the target of unexplained photographing is unlikely to have any idea why his or her photograph is being taken. Moreover, given the less intrusive and commonly employed tactics available to unions to ascertain employee sentiment through voluntary responses and discussion, the subjects of union photographing would have even greater cause to wonder why their interactions with union supporters needed to be visually documented.

Similarly, from a union's perspective, photographing of employees simply does not play the same central role in employee self-organization occupied by the solicitation and petition activity on which the *Randell I* majority relied. As previously stated, polling and solicitation are recognized as traditional vehicles for organizing, but unexplained photographing serves no such crucial function. Indeed, common sense suggests that photographing must furnish a comparatively unreliable measure of employee sentiment. The very presence of a union photographer recording Section 7 activity would tend to induce employees unsympathetic to the union to accept its proffered literature simply to avoid being permanently recorded as antiunion and becoming identifiable as such on sight. Illustrating this important point, the Union here did not claim to be identifying its supporters; the only justification the Union offered for the photographing at issue in this case was that "[i]t's for the Union purpose, showing transactions that are taking place." Nor do the additional post-hoc justifications offered by the dissent (none of which were conveyed to the employees subjected to the photographing alleged to be objectionable in this case) warrant the application of different standards for employer and union photographing. Employers may also want to use photographs for legitimate campaign communication purposes, but the Board does not consider those potential uses sufficient to warrant a presumption that employer photographing does not have a tendency to interfere with free choice. Thus, we find the inherent potential of unexplained photographing by employers or unions to interfere with employees' statutory right of free choice clearly outweighs any legitimate interests of unions or employers in using photographing as a campaign tool.

The Board's treatment of employer photographing as compared to mere observation of open union activity is instructive. As discussed, the Board has found that absent a proper justification, an employer may not photograph employees openly engaged in protected concerted activities because such photographing has a tendency to intimidate. *F. W. Woolworth*, supra. By contrast, an employer may lawfully observe employees engaged in protected activities when those activities are conducted openly on or near company premises. See *Roadway Package System, Inc*., 302 NLRB 961 (1991); *Southwire Co*., 277 NLRB 377, 378 (1985). Thus, the Board has recognized that making a permanent visual record of employees' Section 7 activity without a legitimate justification has a reasonable tendency to coerce employees, even when other forms of observation may not be objectionable. We apply the same reasoning to the Union's photographing in this case.

III. RESPONSE TO DISSENT

We think that the court in remanding this case for further explanation was reasonably concerned about the consistency and rationality of Board decisions in this area. We have addressed those concerns in this decision.

The dissent reiterates the *Randell I* Board rationale, addressed above, that because employers have greater access to employees and more direct control over their working conditions than unions, unexplained photographing will not be viewed by employees as threatening when union agents hold the camera. Again, we do not understand why that would be the case. Union agents clearly can, and do, as the dissent concedes, commit coercive acts, including acts of physical violence and other retaliatory conduct against nonsupporters both during and after election campaigns. Indeed, precisely such conduct led Congress to establish union unfair labor practices in the Taft-Hartley Act. Moreover, unions, unlike employers, can lawfully solicit employees to reveal their stance in a campaign. Unions, unlike employers, may also visit employees at their homes, and employees will likely be aware that the union knows where they live as a result of the *Excelsior* list. Thus, employees plainly have a reasonable basis to believe that unexplained photographing of their Section 7 activity (or their refraining therefrom) is intended for improper purposes.

[22] See *Allegheny Ludlum Corp*., 333 NLRB 734, 742 (2001), enfd. 301 F.3d 167 (3d. Cir. 2002).

The dissent finds it "ironic" that we here forbid union photography without explanation and yet we permit a union to record employees' views in other ways (by asking employees to sign cards or sign petitions or by conducting polls). We find no inconsistency. In the latter instances, the acts themselves show their obvious purpose to employees, viz to solicit support for the union and/or to gauge the extent of such support. By contrast, the photographing of an employee (who, for example, is accepting or declining a union flyer) does not reveal an obvious purpose. Absent an explanation, employees are left to wonder why they are being photographed.

Contrary to the dissent, we do not say that the capacity of unions to coerce employees is "essentially the same as that of employers." Rather, we simply say that unions have sufficient power to coerce employees such that employees may reasonably fear union retaliation when their Section 7 activity is the subject of unexplained photographing. The Board's experience in the administration of the Act confirms that employees may reasonably fear union coercion and retaliation.[23] Thus, the dissent's emphasis on the comparative coerciveness of employer and union photographing misses the point. The issue is not whether union photographing is as coercive as employer photographing, but rather whether the Union's conduct here had a reasonable tendency to interfere with employee free choice in the election. We find that it did. [24]

The dissent says that our even-handed treatment of employers and unions represents "an arbitrary consistency of legal standards." We believe that consistency of legal standards and even-handedness of application does not constitute arbitrary decisionmaking. To the contrary, we believe that our approach is true to the Board's overriding mission of protecting the right of employees to engage in union activity and to refrain from such activity.

We reject the dissent's suggestion that this issue should be analyzed by weighing a union's "legitimate needs and interests in photographing employees against the potential for interfering with employee free choice." As we have shown, unexplained union photographing has a reasonable tendency to interfere with employee free choice. That interference should be reflected in Board law, not balance-tested away. Similarly, we are not persuaded by the dissent's argument that a different standard for employers and unions is justified because unions have a legitimate reason "to record employees' organizing activities" while employers "normally" do not. We agree that a union seeking to organize employees has a legitimate reason to record their views concerning representation, and our decision today is consistent with that principle. We simply insist that a union record employees' views noncoercively. As shown, photographing in the absence of a legitimate justification does not meet that standard.

Still, our decision today does accommodate a union's legitimate interest in photographing employees. Where such a legitimate justification genuinely exists, union photographing will be unobjectionable if (as more fully explained below) that justification is timely communicated to employees.

We also reject the dissent's argument that the potential noncoercive justifications for such photographing by unions would be so self-evident to employees to warrant different standards for unions and employers. As noted, unions have a variety of less intrusive means of accessing employees and determining their views, including home visits, mailings with the use of an *Excelsior* list, and leafleting. In addition, unions may directly solicit employees' support and make a written record of their responses. See *Springfield Hospital*, supra.[25] Hence, there is no reason to suppose that employees would assume that unions would employ a far less direct and reliable barometer of employee sentiment (photographing employees' nonverbal responses to solicitation activity) to accomplish the same purpose. Furthermore, there is

[23] As one court of appeals observed, "Both the courts and the Board, through the application of logic and the experiences of life, have recognized the coercive and intimidating effect Union photography may have on employees during an election." *NLRB v. Lakewood Engineering & Mfg., Inc.*, mem .28 F.3d 1216 (7th Cir. 1994). Contrary to the dissent, we do not think statistical comparisons of unfair labor practice complaints issued against employers and unions justify presuming that employees will inevitably view identical conduct as coercive when engaged in by the former but benign when engaged in by the latter. Certainly, employees who exercise their Sec. 7 right to oppose unionization are not likely to share the dissent's view of an obvious innocent purpose to unexplained photographing of their reaction to union leafleting. As the Supreme Court has stated: "If we respect, as we must, the statutory right of employees to resist efforts to unionize a plant, we cannot assume that unions exercising powers are wholly benign towards their antagonists whether they be nonunion protagonists or the employer." *NLRB v. Savair Mfg.*, 414 U.S. 270, 280–281 (1973).

[24] The dissent attempts to confuse the issue by comparing our decision here to *Harborside Health Care, Inc.*, 343 NLRB No. 100 (2004). The issues presented in *Harborside Health Care* have no bearing on this case, and we disagree with the dissent's characterization of that case as having "radically reinvented" the Board's approach to prounion supervisory conduct during election campaigns. To the extent that the decisions share any similarity, it is that both are based on the overriding concern of protecting employee free choice from intimidation and coercion, regardless of the source.

[25] Indeed, the Union's leafleting and conversations with employees in this case are not challenged and we find no fault with them here. The dissent's argument that restricting photographing will limit unions' access to employees thus is not supported by the record and we have no reason to anticipate more limited union access resulting from our decision today.

no reason to believe that employees would more readily discern a legitimate purpose for a union's unexplained photographing than they would for an employer's.

The dissent questions whether recording employees' support or nonsupport would be a legitimate justification for photographing them under the standard announced today. We note that this was not a justification provided by the Union to the employees photographed here, and, thus, the issue is not squarely before us. However, the Board has addressed in prior decisions the type of justifications that would warrant photographing employees' Section 7 activities, and we will continue to be guided by those principles.[26]

IV. CONCLUSION

For the foregoing reasons, we hold that union photographing of employees engaged in Section 7 activity, like photographing by an employer, tends to interfere with employee free choice in an election.[27] Prior to *Randell I,* the Board recognized that such photographing was permissible in certain circumstances, but the standards for unions and employers were slightly different. Thus, the Board found that union photographing was coercive absent a "legitimate explanation," but required a showing of "legitimate justification" for employer photographing.[28] The former standard suggests that the party must explain *to the photographed employee* the reason for the photography; the latter does not. We hold that a single standard must be applied in determining whether there is objectionable conduct where employees are photographed while engaged in Section 7 activity. In order to strike the proper balance between protecting employee free choice, on the one hand, and respecting the legitimate interests of employers and unions, on the other hand, we shall require that there be a legitimate justification for the photographing; and, except in cases where the justification is self-evident (e.g., violence or mass picketing, etc.), we shall require that the justification be communicated to employees in a timely manner. In this way, employees can be assured that they will not be subjected to photographing by an employer or a union except where a legitimate justification exists. In addition, the impact of that photographing on employees will be minimized by the requirement that the employees be made aware of the justification for the intrusion on their Section 7 activities (including their choice to refrain from such activities).

Applying these principles to the facts of this case, we conclude that the Union engaged in objectionable conduct by photographing employees as they were being offered literature by union representatives. For the reasons explained above, such photographing is presumptively coercive. Moreover, the Union did not adequately explain its purpose for the photographing. The one explanation offered to a single employee—"It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run"—was ambiguous at best. It did not establish a legitimate justification for the photographing. Accordingly, the photographing reasonably tended to interfere with employee free choice, and the election must be set aside.[29]

ORDER

IT IS ORDERED THAT the certification of July 27, 1999, issued in Case 28–RC–5274, is hereby revoked.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than

[26] See, e.g., *Nu-Skin International, Inc*., 307 NLRB 223 (1992) (no objectionable conduct when union photographed employees who voluntarily attended a union picnic away from work and were told their pictures would be used to memorialize the occasion); *F. W. Woolworth,* 310 NLRB 1197 (1993) (the mere belief that "something 'might' happen did not justify an employer's photographing of employees' handbilling activity").

[27] The question of whether union photographing of employees in connection with picket line activities is unlawful was not addressed in *Randell I,* and we therefore find it unnecessary to address that question for the purpose of this decision.

[28] Compare, *Pepsi-Cola Bottling Co.,* 289 NLRB 736 (1988) (union photographing), with *F. W. Woolworth,* supra (employer videotaping).

[29] As previously stated, in light of our disposition of this case, it is unnecessary to pass on whether the third-party conduct in this case was objectionable or should be considered as a factor in determining the impact on employees of the Union photographing discussed above.

12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Sheetmetal Workers' International Association, Local 359, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. July 26, 2006

Robert J. Battista , Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS LIEBMAN and WALSH, dissenting.

Although the District of Columbia Circuit remanded this case for a limited purpose, the majority treats the remand as a chance to revisit—and overrule—our original holding: that absent evidence of threats or other coercion by a union, the union's photographing of employees engaged in protected activity during an election campaign does *not* interfere with employee free choice and thus is not a basis for setting aside the election. According to the majority, this rule amounts to "disparate treatment" of employers and unions, because under established law (which the majority leaves in place) *employer* photographing is presumptively objectionable. But in this context, there are basic differences between union conduct and employer conduct. A union has much less access to employees and much stronger legitimate interests in photographing them, and its conduct is far less likely to coerce them. Imposing the same rule on unions, then, simply puts an unwarranted burden on the ability to organize. Ironically, the majority endorses the Board's sound approach to other union organizing tools—recording employees' views by way of home visits, authorization cards, petitions, or polls—although these activities would seem to raise the same concerns the majority has identified concerning photographing.

I.

We would adhere to the Board's original decision.[1] The question posed by the District of Columbia Circuit's remand, in turn, can easily be answered.

A.

In *Randell I*, the Board overruled an earlier decision, *Pepsi-Cola Bottling* Co., 289 NLRB 736 (1988), which had found objectionable the unexplained union videotaping of employees being handed union leaflets as they left work.[2] The *Randell I* Board observed that:

> *Pepsi-Cola*'s general prohibition against making a visual record of employees' reactions to proffered union literature cannot be reconciled with Board and court cases permitting unions to ask employees directly whether they support the union, to attempt to persuade employees to sign petitions in support of representation, and to record the employees' responses. [328 NLRB at 1035 (collecting cases).]

The Board pointed to "many legitimate reasons why a union would photograph employees in the course of an organizing campaign": to help direct and deploy union staff; to create campaign literature; to demonstrate that the union is actively campaigning; to gauge the extent of union support; and, perhaps most importantly, to identify supporters and potential supporters. Id. at 1036. "In sum," the Board explained, "photographing employees during an organizational campaign is one means by which unions can determine the identity and leanings of employees and carry out their legitimate objective of attaining majority support." Id.

[1] *Randell Warehouse*, 328 NLRB 1034 (1999) (*Randell I*). Member Liebman joined the *Randell* I decision. Member Walsh was not a Member of the Board in 1999 when *Randell* I issued.

[2] For a history of the Board's approach to this area, see Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* §7.17 (2d ed. 2004). Professor Gorman and Professor Finkin describe *Pepsi-Cola Bottling*, supra, as itself a departure from the Board's precedent in "adopt[ing] a more categorical approach." Id. at 217.

The Board rejected the contention that this approach wrongly treated employers and unions differently. The law already permitted unions to use campaign tools that were denied employers, such as home visits[3] and polling.[4] Id. at 1037. Different treatment was justified "in recognition of the fundamental fact that an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment." Id. At the same time, the union lacks the easy access to employees for campaigning purposes that the employer enjoys. Id.[5]

Finally, the Board limited its earlier holding in *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989), agreeing with former Member Higgins' concurrence in that case that union photographing is objectionable only where it is accompanied by union threats or other coercive union conduct. No such threats *attributable to the union* were present in *Randell I*, the Board observed, distinguishing *Mike Yurosek*. Id. at 1036.

B.

On review, the District of Columbia Circuit denied enforcement, remanding the case to the Board to explain one aspect of its decision.[6] The court held that the Board had failed adequately to consider the applicability of *Mike Yurosek*, citing the threatening conduct of *prounion employees* here. 252 F.3d at 448. The court remanded the case to the Board "to explain why [that] threatening conduct . . . did not amount to objectionable conduct under" *Mike Yurosek*. 252 F.3d at 449.

The short answer to the court's remand is that in the election context, the Board—with the approval of the courts—has long applied a stricter standard to the conduct of the parties (unions, employers, and their agents) than to the conduct of third parties.[7] *Mike Yurosek* involved objectionable photographing by a union agent who overtly threatened employees at the same time. This case, in contrast, involves alleged third-party misconduct (the prounion employees were not union agents); moreover, there was no connection of any kind between that misconduct and the Union's photographing. *Mike Yurosek*, then, is distinguishable on the grounds that the threats here (1) are not attributable to the Union, and (2) are not related to the photographing.

II.

Instead of simply responding to the Court's remand, the majority brushes aside the textured rationale of *Randell I*, in favor of an arbitrary consistency of legal standards. According to the majority, unions and employers must be subject to the same restrictions on photographing: for both, it is presumptively coercive of employee rights, absent an express explanation of its purpose. Citing Board precedent,[8] the majority offers three premises supporting the view that employer photographing is coercive: (1) an employer may be displeased with employees who fail to support its position; (2) photographing represents "permanent recordkeeping;" and (3) employees may fear that the record made of their pro-union choice could be used for reprisal. The majority asserts that these premises are equally applicable to union photographing. But the majority overlooks a more basic premise underlying the Board's decisions: Under normal circumstances, employers have no legitimate reason to record employees' organizing activities. This is not the case for unions.

What is missing from the majority's analysis, then, is any real grasp of the very different positions that unions and employers occupy with respect to employees, in terms of campaign access, economic relationship, and potential for coercion. As the *Randell I* Board explained, unions have far less access to employees and far less opportunity to coerce them. To the extent that the Board must weigh a party's legitimate needs and interests in photographing employees against the potential for interfering with employee free choice, the balance is simply not the same for unions and employers. The majority gets it wrong with respect to both sides of the scale. As a result, the use of a legitimate organizing tool is now practically prohibited.[9]

[3] Compare, *Peoria Plastic Co.*, 117 NLRB 545 (1957) (prohibition against employer home visits) with *Canton, Carp's, Inc.*, 127 NLRB 513 fn. 3 (1960), citing *Plant City Welding & Tank Co.*, 119 NLRB 131 (1957) (permitting union home visits).

[4] Compare, *Offner Electronics Inc.*, 127 NLRB 991 (1960) (prohibiting employer's preelection poll) with *Glamorise Foundations, Inc.*, 197 NLRB 729 (1972) (permitting union poll).

[5] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

[6] *Randell Warehouse of Arizona, Inc. v. NLRB*, 252 F.3d 445 (D.C. Cir. 2001).

[7] See, e.g., *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (where party conduct is involved, test is whether the conduct "has the tendency to interfere with the employees' freedom of choice"); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000) (where third-party conduct is involved, test is whether the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible"). See also *Overnite Transportation Co. v. NLRB*, 140 F.3d 259, 264 (D.C. Cir. 1998) (pre-*Randell I* discussion of Board's separate standards, in context of videotaping and photographing of employees by union supporters).

[8] See *F. W. Woolworth*, 310 NLRB 1197 (1993); *Waco, Inc.*, 273 NLRB 746, 747 (1984).

[9] In restricting unions' organizing efforts in the name of equality, the majority's decision here bears an unfortunate similarity to the recent decision in *Harborside Health Care, Inc.*, 343 NLRB No. 100 (2004), from which we dissented. There, also on remand from a court of appeals, the Board radically reinvented its approach to prounion supervi-

A.

The fact that unions, like employers, have the capacity to coerce employees weighs heavily in the majority's analysis. It is no great concession to acknowledge that unions can, and sometimes do, commit unfair labor practices against employees. What matters here, rather, is the *relative* capacity of unions to take such action.

The majority errs in suggesting that the capacity of unions to coerce employees, or the incidence of unfair labor practices by unions, is essentially the same as that of employers. For decades, the Board and the courts have recognized that employers are in a far more effective position to coerce employees than unions are. To point out the obvious, employees are economically dependent on the employer, who controls every aspect of their working lives. The employer may fire workers, discipline them, impose harsher working conditions, cut their pay, and deny them benefits.[10] As one court concluded, "By no stretch of the imagination are employers of unorganized workers and unions seeking to organize those workers equally matched with respect to their powers of or opportunities for the exercise of coercion...."[11]

Recent experience in enforcing the Act is demonstrative. Between 1994 and 2005, for every complaint that the General Counsel issued against a union, he issued nine against employers.[12] Correspondingly, during the same period, Board decisions involving employers as respondents exceeded decisions involving union respondents by a rate of 9 to 1.[13]

The Board's experience tends to show, then, that, in general, employees have less to fear from unions than from employers. Employees, it is fair to assume, understand as much.

B.

In turn, as *Randell I* explained, unions have legitimate reasons to engage in photographing employees during an election campaign. And, contrary to the majority's claim, employees likely will recognize that those interests are at work, in the absence of any coercive union conduct that would raise suspicion about the photographing, even if the union does not provide employees with an explanation. Employees understand that the campaigning union lacks access to them on the job, but still must identify supporters and potential supporters. They may well have experienced union home visits, polling, petitioning, and authorization card solicitation—all permissible union tools, which the majority endorses, even though they involve the same recording of employee views condemned in the case of union photographing.[14]

In contrast, there is no presumptive justification for an employer's photographing of employees while they engage in protected organizing activity; such employer conduct is inherently coercive.[15] Although they are free to express their views against unionization, as Section 8(c) of the Act establishes, employers are denied certain campaign tools available to unions, as the *Randell I* Board explained. In the hands of employers, these tools inherently tend to coerce employees, given their economic dependence on the employer and the obvious fact that an "employer cannot discriminate against union adherents without first determining who they are."[16] Prohibiting employers from using these tools, in turn, does not impose a substantial burden on them. They retain virtually unlimited access to employees in the workplace and remain free to use tactics ranging from captive-audience meetings to individual sessions with supervisors to persuade employees to vote against the union.[17]

More fundamentally, of course, the Act does not envision that employers will play the same role with respect to the exercise of employee free choice as unions do. The

---

sory conduct during election campaigns in which employers oppose unionization.

[10] For a recent case illustrating the range of coercive tactics open to employers, from economic reprisals to physical violence, see *Smithfield Packing Co.*, 344 NLRB No. 1 (2004). Ironically, the majority cites cases in which unions, having succeeded in becoming employees' representative, unlawfully persuaded *employers* to engage in work-related coercion.

[11] *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 364 (6th Cir. 1984) (rejecting argument that a union's preelection polling should be treated as impermissible per se, as an employer's polling is). See *Maremont Corp. v. NLRB*, 177 F.3d 573, 577 (6th Cir. 1999) (following *Kusan Mfg.*); *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972) (rejecting equation of employer polling and union polling).

[12] See Board's Annual Report, Vol. 59–70 (1994–2005), at 8–10.

[13] Id. at 9–11. The statistics cited are for "initial decisions" by the Board, excluding backpay cases, jurisdictional work disputes, and supplemental decisions.

[14] See, e.g., *Springfield Hospital*, 281 NLRB 643, 692–693 (1986), enfd. 899 F.2d 1305 (2d Cir. 1990).

The majority insists that photographing is "different" from home visits, polling, and other unchallenged union methods of gauging and recording employees' support. According to the majority, photographing is: "non-consensual," more "intrusive," and "unreliable." But photographing an employee who chooses not to accept union literature is no more "non-consensual" than recording an employee's refusal to sign an authorization card when solicited. In either case, the employee reveals a disinclination to support the union.

Moreover, union photographing is no more "intrusive" than a home visit by the union. As for reliability, none of a union's organizing tools provide a foolproof measure of employee sentiment. The imperfect reliability of union organizing methods presents an argument for more, not fewer, legitimate tools to assist in communicating with employees.

[15] See, e.g., *F. W. Woolworth Co.*, supra.

[16] *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1114 fn. 15 (1999) (citation omitted); see also *Allegheny Ludlum Corp.*, 333 NLRB 734, 737–738 (2001), enfd. 301 F.3d 167 (3d Cir. 2002).

[17] See *Harborside Healthcare*, supra, 343 NLRB No. 100, slip op. at 12 and fn. 14 (dissent) (collecting illustrative cases).

affirmative relationship between unions and employees seeking to organize themselves is at the heart of the Act's promotion of collective bargaining.[18] The Supreme Court has endorsed both unions' participatory role in organizing and the related need for unions to communicate with employees concerning self-organization.[19] Meanwhile, it has recognized that "any balancing of [the] rights [of employees and employers] must take into account the economic dependence of the employees on their employers."[20]

In short, the Act demands that, at a certain point, employers must stay out of the way when their employees seek to organize themselves. As the Board observed long ago, "[i]nherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment—'full freedom' from employer intermeddling, intrusion, or even knowledge."[21] Unions, in contrast, could not organize effectively without doing precisely what employers are forbidden from doing.[22]

In sum, when an *employer* photographs or otherwise records employee organizing activity, it is reasonable for employees to feel threatened, because in usual circumstances there can be no legitimate basis for the employer's actions. When a *union* photographs employees involved in organizing activity, there may be many legitimate reasons, consistent with the union's affirmative role in furthering the exercise of statutory rights. Unless employees have some specific basis for fearing the union—which stands in a very different relationship to them than the employer does—the union's photographing has no coercive tendency.[23]

C.

There are good reasons, then, for not requiring a union, in contrast to an employer, to explain to employees why it is photographing them. Such a requirement is, in any case, untenable.

The majority declines to explain what it means by a "legitimate justification" or "explanation" that must accompany photographing of employees' organizing activity, whether by a union or an employer. The majority specifically refuses to state whether it would be acceptable for a union to tell employees that it is, in fact, recording their union sentiments, notwithstanding the majority's endorsement of this purpose for polling, soliciting authorization cards, and the like.[24] Moreover, the majority rejects the Union's actual explanation in the present case as "ambiguous," although it indicated no more than an innocuous, internal, i.e., non-threatening, union purpose.[25] Finally, the majority's sole suggestion of a bona fide "justification" involves a union's photographing of employees voluntarily attending a union picnic, away from the workplace and not involving the recordation of the employees' attitudes toward the union.[26]

The majority's implicit message seems clear enough: regardless of the similarity of union photographing with other, legitimate organizing aids, and regardless of the profound difference between a union's role and an employer's role in employee organizing activities, the Board will find union photographing coercive in virtually every circumstance where it might record an employee's view of the union.

III.

Recognizing that the realities of the workplace bear differently on employers and on unions is not disparate treatment; it is common sense and fidelity to the Act. Our original decision in this case was correct. Today's decision, in contrast, is arbitrary both in failing to see the difference between union photographing and employer photographing and in failing to see the similarity between union photographing and other, permissible organizing tools. The result places unions in a dilemma: Photographing employees is objectionable, unless a legitimate justification is communicated to the employees, but the majority implies that a central justification for photographing employees, to identify supporters and potential

[18] See Sec. 1 of the Act.

[19] *NLRB v. Babcock & Wilcox Co.*, supra, 351 U.S. at 113 (examining union organizers' access to company property and observing that the "right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others").

[20] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (examining employer's campaign statements).

[21] *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358, 1360 (1949).

[22] Cf. *Glamorise Foundations*, supra, 197 NLRB at 729–730 ("While a union engaged in organizing employees may legitimately measure its support among the workforce, an employer may not properly engage in or encourage such surveillance").

[23] The majority asserts that we miss the point when we state that union photographing is not as coercive as employer photographing, because the issue is simply whether a union's conduct has a reasonable tendency to coerce. With all due respect, it is the majority that misses the point. Because an employer usually has *no* legitimate reason to photograph its employees during an organizing campaign, it is appropriate to conclude that such conduct has a reasonable tendency to coerce. By contrast, employees are well aware of the comparative lack of access and power that unions have over them, and have no reason to fear a union's use of those means of access it does have, including photography, in the absence of threatening conduct.

[24] Similarly, the majority fails to provide examples of explanations that employers might use. Where special circumstances exist (violence and mass picketing), the majority holds that employers would not be required to explain their recording of the events.

[25] The Union told an employee that the photographing was "for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run."

[26] See *Nu Skin International*, 307 NLRB 223 (1992).

supporters of the union, is inherently coercive. In light of its internal contradictions, we do not see how the majority's decision can stand. Accordingly, we dissent.

Dated, Washington, D.C. July 26, 2006

Wilma B. Liebman, Member

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD